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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 510.

HERMAN KRAVITZ, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Herman Kravitz, your petitioner, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on August 12, 1960.

OPINION BELOW

The opinion of the court below (*infra* Appendix A, pp. 1a-16a) has not yet been reported.

JURISDICTION

The judgments of the court below (*infra*, Appendix B, pp. 16a-18a) were entered on August 12, 1960. A timely petition for rehearing was denied (*infra*, Appendix C, p. 19a) on September 30, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The FIFTH AMENDMENT provides, *inter alia*, that —No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *

2. The SIXTH AMENDMENT provides, *inter alia*, that —In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *

3. TITLE 18, UNITED STATES CODE:

§ 2. *Principals*

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offe[illegible] against the United States, is also a principal and punishable as such.

4. TITLE 18, UNITED STATES CODE:

§ 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

5. INTERNAL REVENUE CODE OF 1939:

§ 145. *Penalties*

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., § 145.)

QUESTIONS PRESENTED

1. Whether the prosecutor's statement in his argument to the jury that the offense of tax evasion is "in a real sense, treason" constituted incurable prejudicial error.

2. Where a witness for the prosecution is a thrice convicted felon, an inmate of a federal prison, a severed co-defendant in the indictments being tried, the designer and beneficiary of the tax evasion scheme underlying the prosecution; where it has been proven that the witness gave false testimony on the stand; and where the witness is in a position to benefit financially in his own federal tax difficulties and also to win discharge of criminal indictments pending against him by incriminating the other defendants, and there are still other reasons to doubt his credibility, was it prejudicial error for the trial judge to throw the weight and prestige of his office into the equation by charging the jury that he believes the witness told the truth and that he does not believe the petitioner told the truth?

3. Where a vital issue at the trial is the credibility of a prosecution witness and the defense has challenged his credibility on numerous grounds, was it prejudicial error for the trial judge to single out only one of those grounds in his charge to the jury and ask them whether that is sufficient reason to disbelieve the witness, thereby effectively removing from the equation all the other grounds presented by the defense?

4. Whether it was prejudicial error for the trial judge to read to the jury portions of the direct testimony of a witness harmful to petitioner without also

reading to the jury the relevant cross-examination wherein it was shown that the same witness, five years earlier, in a sworn statement given to agents of the Internal Revenue Service, had recounted the circumstances in detail without ever mentioning that petitioner had any part in them.

5. Where the defense has suggested that the Government may have inconsistently prosecuted two persons for having received identical funds, was it prejudicial error for the trial judge to refuse to postpone the trial and to examine the Grand Jury testimony of Government witnesses even in connection with petitioner's post-trial motions, when such testimony was made available to him after the verdict, to ascertain whether the Government had in fact mounted inconsistent prosecutions?

6. Whether it was improper for a trial judge to impose an unprecedentedly harsh sentence upon a defendant because the defendant chose to stand trial rather than be convicted and sentenced upon a guilty plea.

7. Whether it was improper for the prosecutor to mislead the jury and petitioner with respect to matters concerning the veracity and motives of one of the prosecution's principal witnesses against petitioner.

STATEMENT

This is a criminal proceeding for income tax evasion under § 145(b) of the Internal Revenue Code of 1939 and for conspiracy to evade taxes in violation of 18 U.S.C. § 371. During the year 1951, Kravin Park Clothes, a clothing manufacturing company, reduced

its reported taxable income by falsely stating that certain large sums of money had been paid out to subcontractors. Petitioner and his father owned all the stock of Kravin Park Clothes. One Joseph Abrams acted as accountant and tax adviser to the firm. Following a complicated financial scheme devised by Abrams, most of the funds diverted from Kravin Park were eventually converted into bearer bonds.

A. Events Before and After the Trial

Several criminal charges followed from this diversion of funds. This particular proceeding arose in New Jersey. There petitioner, his father and Abrams were indicted in March 1958 for wilfully understating the corporation's net income and for conspiracy to evade corporate income and excess profits taxes for 1951. At the same time, both petitioner and his father were separately charged with understatement of their personal income for the same year, on the theory that they had received some of the diverted funds.

Abrams was indicted in New Jersey only for his complicity in the Kravin Park Clothes income tax offenses. Subsequently, in July 1958, in New York, he was charged with wilful understatement of his personal income taxes for the years 1951 and 1952 as well as for evasion of corporate income taxes by two New York corporations which he controlled.

In the grand jury proceedings leading to the latter indictment, petitioner appeared voluntarily as a witness for the Government. This appearance was made by petitioner on advice of counsel that, if he testified concerning Abrams and was of assistance to the Government in the prosecution of Abrams, the indictment

against petitioner's father in New Jersey would be "nolle prossed" and petitioner himself would be in a favorable position to receive a suspended sentence. (24a).* Thereupon, petitioner, who had previously entered a plea of not guilty to all charges, moved on July 3, 1958, to change his plea to guilty. The Government requested the court not to sentence petitioner until the case against Abrams had been completed in New York.[1]

More than a year later, in November 1959, Abrams pleaded guilty to one count in each of the indictments pending in New York. At that time he was already in prison, serving a two and one-half year sentence imposed for embezzlement of United States Government property. For the charge involving his 1952 personal income, Abrams was fined and received a two year sentence, to run concurrently with the embezzlement sentence he was then serving. On the 1951 tax indictment, he was fined and sentenced to one year in prison, but execution was suspended and he was placed on probation following release from prison; a condition of that probation was that he pay the

* References are to pages in Appellants' Appendix and Additional Appendix filed in the Court of Appeals, nine copies of which have been filed in this Court.

[1] There is not the slightest explanation for the delay in trying the New Jersey indictments against Abrams. The prosecutor had stated that the Government was ready to move for trial 10 days after the arraignment (32a), but the charges against Abrams were allowed to lie fallow until they were dismissed in April of 1960. (772a-775a).

One can hardly escape the conclusion that when Abrams learned that petitioner testified against him before the New York grand jury within a day or two afterwards (305a), and Abrams admittedly became actually concerned (307a), steps were taken to prevent Abrams from coming to immediate trial in New Jersey.

outstanding tax obligation on his 1951 personal income. The net effect of these sentences on the tax evasion convictions was to dispose of the pending charges against Abrams without any imprisonment other than that already imposed for embezzlement.

Abrams testified in the instant case that all of this was according to a prearrangement. Before he entered his two guilty pleas, he knew that the other New York charges were going to be "nolle prossed." (31a). In addition, he knew that the "deal" covered the New Jersey indictments, although there was to be no "nolle pros" there until after the trial of petitioner and his father. (304a). He had been told that the Justice Department had agreed to go along. (304). In fact the Department wrote to the United States Attorney in New Jersey on November 20, 1959, authorizing dismissal of the indictments against Abrams for the reason that he was already in prison, albeit on a completely unrelated offense. But petitioner did not learn of this until after the decision of this case by the Court below.

Meanwhile, counsel for petitioner, albeit unaware of the arrangement between Abrams and the Government, became apprehensive.[2] On October 9, 1959, a motion was filed on behalf of petitioner to withdraw the guilty plea which had been entered in July 1958 and to reinstate the plea of not guilty. The motion was granted and the case set down for trial.

---

[2] At the hearing on motion to withdraw the guilty plea, the Court addressed counsel for petitioner as follows: "Possibly, Mr. Malandra, if the court had not expressed its thoughts we would not be here on this motion today." (30a). The Court stated that, "It just means a little delay." (33a).

Ten days before the trial actually began, the Government moved for consolidation of the charges against petitioner, his father and Abrams. However on the day set for trial, on the Government's motion the charges against Abrams were severed.

Abrams appeared as a principal witness for the prosecution. On February 10, 1960, petitioner and his father were found guilty on all the charges against them. On April 20, 1960, all charges still pending against Abrams were dismissed. Abrams never went to trial at any time in any district.

Petitioner and his father were given extraordinarily harsh sentences. Openly nettled that petitioner had "animal-like" asserted his right to plead not guilty and stand trial, the District Court (Madden, J.) sentenced petitioner to ten years in prison and a fine of $30,000. Petitioner's father received a sentence of two years in prison and a fine of $30,000. The District Court further refused to permit either defendant to remain at large on bail pending a motion for new trial and, later, pending appeal to the Court of Appeals.

The Court of Appeals for the Third Circuit overruled the District Court twice on the subject of bail. On the merits, that court (Goodrich, Kalodner, Forman, JJ.) reversed the conviction of petitioner's father, holding that ". . . the most that can be said in the case against Samuel Kravitz is that there are one or two circumstances which arouse a little suspicion and might make one lift one's eyebrows." (*infra* Appendix A, p. 15a). The judgments against petitioner were affirmed.

B. Vital Occurrences During the Trial

1. The prosecutor's statement, in his final argument, that tax evasion was "in a real sense, treason"

Towards the close of his summing up, the Assistant United States Attorney said (674a-675a):

> "This crime that we are dealing with here is, in a real sense, treason. These defendants, by their action, have torn away the very foundation of our Government. Unless the Government maintains a strong, even, economic keel, it will be destroyed."

The Court of Appeals declared that the language used by the prosecutor was "deplorable," that an Assistant United States Attorney, representing the authority of the United States, must rest his case upon evidence, "not epithet." The Court of Appeals refused any relief to petitioner, however, on the ground that the accusation of treason probably had no prejudicial effect and that counsel for petitioner lay low, raised no objection and only brought the matter up months afterward as a basis for reversal. (*Infra* Appendix A, p. 10a).

In fact, the "deplorable" conduct was raised the day following its occurrence in the defendants' motions for judgment of acquittal or new trial. (8a). The District Court, far from rebuking counsel for the Government, said that he was not sure whether or not evasion of income tax constituted treason. (745a). The attitude of the United States Attorney's office is made unmistakably clear by its argument to the Court of Appeals. The prosecutor's brief declared: "[I]t is fatuous to complain of the allusion to 'treason' when the crime charged involved breach of faith with one's government." (U.S. Brief, p. 29).

2. The District Court's charge on the credibility of Joseph Abrams

A crucial issue in the trial was the whereabouts of the bonds, which were the end product of Abrams' scheme to evade income taxes. The defense theory was that Abrams had taken and kept all of them. (638a-646a). Abrams, on the other hand, had testified that more than three-quarters of them had been given to petitioner. (275a-276a). There was thus presented a direct clash of opposing testimony to be resolved by the jury.[3]

In this setting, the District Court placed the imprimatur of the Court on the Abrams' testimony. He charged the jury as follows on the credibility of Abrams (711a):

> "Let me say quite frankly to you that I do not believe Joseph Abrams absolutely and in all respects. In the Court's estimation it would be difficult for any man to get on the witness stand and be absolutely correct regarding what happened back in 1951, especially when it involved multifarious transactions surrounding these events. . . . It is easy to see how a mistake would be made. When you couple that with the admission on the part of Abrams that he still has criminal and civil tax problems to face in the future, one has some difficulty in accepting his story as gospel in all respects.

[3] The importance of the issue is magnified by the unprecedentedly severe sentence meted out by the District Judge. Petitioner received consecutive sentences for evasion of his personal income tax and the evasion of the corporate income tax. In both instances, the judge imposed the maximum sentence permissible under the statute. If the petitioner was unjustly convicted on the indictment involving his personal income, five years will be eliminated from his prison sentence.

"However, in view of all the other testimony and evidence I say quite frankly to you, members of this jury, that in the main I believe the testimony of Abrams was credible. The only recollection that the Court has of Abrams' testimony being at variance with the truth, as I see the truth in the matter, is that in his testimony, that he did not sign the name Joe Haber on the signature card, Exhibit G-54. . . . when it appears from the stipulation of the handwriting expert that he did.

"Is this sufficient to disregard his testimony altogether regarding this scheme and the various parts the defendants played in it? That is for your judgment.

"And, just as I have informed you of my reactions regarding the credibility of the testimony of Abrams, I think it proper also to point out to you my beliefs regarding the testimony entered in the record here of Herman Kravitz before the Grand Jury in New York. I do not believe that testimony in all respects and for the same reasons. Kravitz knew then that he had criminal and civil tax problems to face in the future the same as Abrams had and has.

"Let me point out to you the exhibit which is a jeopardy assessment notice against Kravin Park Clothes in the amount of $1,252,077, dated November 1, 1956. Let me further remind you that Herman Kravitz was indicted, as you can see from the indictments which you will take into the jury room with you, on March 13, 1958, and that he plead not guilty to those indictments in this court, according to the records of the court, on June 20, 1958. This was prior to the testimony of Kravitz in New York on June 24 and June 30, 1958. So that it is completely possible that Herman Kravitz had an eye to the future at that time and was putting his best foot forward."

The reference to the handwriting expert concerns one instance in which Abrams was caught in a flat lie. He testified unequivocally that he had not signed a certain document introduced by the Government. (244a, 365a-366a). The Government stipulated that *petitioner's* handwriting expert would demonstrate that this was a falsehood on Abrams' part. (610a-611a).

The District Judge charged the jury that he believed that Abrams' story was the truth in the main. He asked them whether one lie was enough to disregard Abrams' other testimony. By so doing, he wrote off from consideration the ponderous other reasons for disbelieving Abrams. He ignored and led the jury to ignore that Abrams was a convicted felon under at least three sentences. (222a-223a, 310a-313a, 318a-319a). He ignored and led the jury to ignore that Abrams was, while testifying, an inmate of a federal prison. (222a, 267a). He ignored and led the jury to ignore that Abrams had on several occasions sought the shelter of the Fifth Amendment before Congressional investigating committees. (368a). He ignored and led the jury to ignore that Abrams had testified that he had knowingly made false statements and affidavits to the Government for his personal advantage. (332a-334a). He ignored and led the jury to ignore that on the face of Abrams' own testimony he was the designer of the illicit scheme and an accomplice in its execution. (222a-369a). He ignored and led the jury to ignore that Abrams expected to obtain a *nolle prosequi* of the indictments still hanging over his head (295a, 303a-304a), and that Abrams had vital continuing motives to buy his peace from the prosecution at the expense of the two defendants who were on trial.

3. The distortion in District Court's reading of a portion of the testimony of one witness

Elsewhere in his instructions to the jury, the District Court read to them directly from the transcript (708a), a portion of the testimony of one prosecution witness. The effect was to recall to the jury *only* testimony harmful to petitioner. The Court refused to read, or even refer to the material portions of the cross-examination of the same witness where strong doubt was cast upon the accuracy of the wtiness' direct testimony, (715a).

The witness, one Laura Barko, had been an employee of Joseph Abrams during 1951. She had been instrumental in opening one of the accounts through which diverted funds had been channeled. Her direct testimony, read to the jury by the Court during his charge, was to the effect that petitioner had asked her to open this account and Abrams approved. (708a). On cross-examination it was brought out that in 1955, five years before the trial, this same witness had given a sworn statement to Internal Revenue officials wherein she described in detail the setting up of the account in question. In the course of that statement, the witness had never once mentioned the name of petitioner. (188a-194a).

This earlier statement cast considerable doubt on her trial testimony implicating petitioner. Nonetheless, the District Court read only the harmful portion of her statement.

The Court of Appeals disposed of this issue by saying that the witness had not "recanted" her original testimony under cross-examination. This overlooks the inconsistency and contradiction between the two statements and the patently belated implication of peti-

tioner. A genuine issue was thus presented for the jury to decide. The Court of Appeals also characterized the episode as a "drop in the bucket", but it was one of the few bits of evidence connecting petitioner with the receiving end of the diversion process apart from Abrams' own testimony.

4. The unread minutes of the grand jury proceedings in New York

In line with the defense view that the money siphoned out of Kravin Park by Abrams' tax evasion scheme had all been taken by Abrams, attempts were made to obtain the minutes of the grand jury proceedings wherein Abrams had been indicted in New York The defense anticipated that examination of the New York Grand Jury proceedings would show Government testimony that all of the funds had gone to Abrams.

The trial judge quashed petitioner's subpoena to produce the Grand Jury testimony. (460a-465a). Petitioner then sought to obtain the Grand Jury testimony by proceeding in New York, and in this was successful. (668a).

Not only had the Government witness Downey testified that he had given testimony before a Grand Jury in New York, and further interrogation was cut off by the Government's objection (488a-490a), but there was another, critical reason for the trial court to inspect the Grand Jury minutes: it was highly material and relevant to determine whether the testimony given before the New York Grand Jury contradicted the Government's instant contention that Herman Kravitz had received the money produced by the illegal scheme

rather than Abrams. It was petitioner's contention that the Government could not properly charge Herman Kravitz with evading his lawful income tax the same money that formed the basis of the charge against Abrams with respect to his personal return. The Government argued this could make no difference (U. S. Brief, pp. 35-36).

The District Court for the Southern District of New York ordered the minutes of the grand jury which had indicted Abrams transcribed and sent to Judge Madden in New Jersey. These minutes did not arrive until after the verdict but before the hearing on the motions for judgment of acquittal or new trial. Judge Madden acknowledged receipt of the minutes but said that he had not bothered to read them. (742a).

Although the defendant requested the trial court here to examine the Grand Jury minutes, the court refused to do so, or even to read them when he received them (742a). It is to be noted that at the outset the district court had allotted a substantially longer period of time for the trial of this case than the time actually required, or even the twenty days estimated by the prosecution (N. T. 34, 39-41). Actually, the court had allowed as trial days until March 10, 1960, although the trial was concluded by February 10. Counsel for defendants, as the record shows, by his stipulations literally saved weeks of trial.

The Court of Appeals held that the District Court's action was not error in the absence of a showing of what the minutes would help to prove.

5. The emotional conduct of the trial judge in imposing an unprecedentedly harsh sentence upon the petitioner

The sentence imposed upon petitioner is summed up in the judge's own words as follows: "If you want to know what that means that means you just got ten years in jail and a thirty thousand dollar fine." (751a). The heaviest sentence imposed by this trial judge for income tax violation in more than a decade was three years and the heaviest sentence during this period which remained unmodified was 18 months' confinement. (See Appendix to Appellant's Brief in the Court of Appeals where the results of 48 income tax evasion cases are set forth.)

The basis for this outburst against petitioner appears in the remarks of the trial court when he announced sentence. He castigated the defendant for having withdrawn a guilty plea and standing trial. He called him "animal-like" because this seeking of a trial upset a deal with the prosecutor to dismiss the charges against defendant's father, charges which the Court of Appeals found so lacking in substantiation that they ordered the father acquitted. He heaped further condemnation on petitioner for not taking the stand and absolving his father from complicity in the tax evasion scheme. The tone of the court's remarks is clear even on the cold record:

To petitioner, the court said:

> "You, sir, I can't even recognize in view of what you have done to your father as being much more—just maybe one step higher than animal-like. You pled guilty in this court, your father was out of the case, and you heard the United States Attorney make a representation to the court that if you were sentenced, he would move to

nolle pros in your father's case. Your thought so much of your own skin that you would see your father go to jail. I don't think any more words need describe you." (750a-751a).

To petitioner's father the court said:

"Mr. Kravitz, it must be a very happy day—I am addressing myself to Mr. Samuel Kravitz—it must be a very happy day for you when you are compelled, as you well know, by the actions of your own flesh and blood, to stand before a criminal court, and accept a sentence at the hands of another human being. Your son had you out of this case. He pled guilty back in July of 1958, and because he was fearful of what justice might bring to him knowing that if he stood trial, you would stand trial side by side with him, he filed with the court an affidavit of innocence, and determined to withdraw his plea of guilty that he had entered, and saw fit not only to place himself on trial but to place you on trial with him, and then after the trial proceeded, and the court denied your counsel's application for a dismissal, and your lawyer still informed you that this case was going to the jury, your son, as is his right, stood on his constitutional ground and did not see fit to take the stand, and say, 'yes, I did these things, I did these things that the Government agents have uncovered by years of toil, but I make one piece of protest, my father didn't know.'. It is very likely that the jury would have believed him. Whether it is truthful or not, you, and you alone, and the Lord knows. There was more than sufficient evidence to warrant the jury's finding. You stand now by the action of your own flesh and blood before a criminal court to accept its sentence." (749a).

If further evidence of the court's emotional bias were needed, it is plainly seen in the refusal of the

trial court to allow the defendants to remain at large on bail after the verdict. Twice the court denied bail without explanation. (720a-722a, 751a-752a). Twice the Court of Appeals had to intervene peremptorily to reverse the trial judge and grant the bail which the lower court had refused.

6. The jury was misled in another vital particular, one as to which the defendant did not become apprised of all the facts until after the argument of this case in the court below

At the very outset of his opening, the prosecutor advised the jury:

> "Now, Joseph Abrams has been severed from the prosecution herein. He is not going to trial at this time in this district." (Additional Appendix, p. 765a)

From this, a jury would conclude that Abrams could be expected to be tried on the indictments against him, either in the District of New Jersey, or in another District. As a matter of fact, a motion had been made by Abrams on August 27, 1958, to transfer to another district (304a-305a) and during the trial the Court stated that it was *still pending*. Furthermore, the same Assistant United States Attorney filed an application to consolidate the trials of *all* defendants, which was granted, but on the day trial was to commence he moved for severance of the trial of Abrams pursuant to a stipulation consented to by Abrams' counsel (Additional Appendix, pp. 766a-771a).

In the course of trial, Abrams said that the charges against him were to be "nolle prossed" (303a-304a, 311a). On the subject of nol-pros, the court below stated before the jury that a lawyer and a prosecutor

could not nol-pros a case, but that it was a matter for the court (311a-312a).

The only rational conclusion which the jury could have reached in light of the foregoing was that Abrams was going to trial at some time in some district, and that his talk about nol. pros was just that and no more.

On April 20, 1960, the indictments against Abrams were dismissed (Additional Appendix, pp. 772a-775a). But it also appears from the order of dismissal that permission to dismiss was received by the prosecutor from the Department of Justice by letter dated *November 20, 1959*, about two months before trial.

REASONS FOR GRANTING THE WRIT

The questions presented by this case are major issues dealing with the administration of criminal justice in the federal courts. In essence, they involve the requisite elements and standards of fairness to be acknowledged as the responsibility of the two representatives of the United States in a federal criminal trial, the prosecutor and the judge. The nature of the issues is more than apparent from the summary of the facts. Without elaboration on the merits of the questions themselves, it is appropriate to develop briefly and specifically how each of the questions presented affects vitally the quality of criminal proceedings in the United States and why petitioner urges this Court to grant his petition for certiorari.

1. The prosecutor's argument to the jury that petitioner had committed "in a real sense, treason"

The issue here is the permissible scope of forensic peroration on the part of representatives of the United States. Very little has ever been accomplished in the

establishment of meaningful standards setting limits on argumentation. Yet the problem has dimensions of the highest importance to the administration of criminal justice in the federal courts.

It is not enough to say, as did the Court of Appeals in this case, that the action of counsel for the Government was "deplorable." Counsel for the Government declared that petitioner had committed "in a real sense, treason." The appellate court characterized this as an epithet. But the Court of Appeals simply matched epithet with epithet. It merely said that the use of epithet was "deplorable," but no sanctions followed.

It is respectfully submitted that gentle verbal wrist-slapping will not control the flights of oratory in summation of counsel.[4] This Court is undoubtedly well aware that the problem of "deplorable" argument is an ever present and increasing one. Petitioner's case is not an isolated instance of misconduct of counsel. Nor will the problem come under control until Government counsel are aware that the outcome of the trial may be affected by the content of their argument to the jury.

The Court of Appeals declared that counsel for the defendant lay low and raised this issue belatedly in an appellate court. That court erred in suggesting that the issue was dredged up from a record months after the event. In fact, it was raised the *following day* in the motions for judgment of acquittal or new

[4] In this case, the United States Attorney argued to the Court of Appeals that it was "fatuous" for petitioner to protest against the grossly improper remarks to the jury. (U.S. Br. 29.) Nothing could more clearly demonstrate the lack of self-restraint on the part of Government counsel on this kind of impropriety.

trial (8a, 726a). Although defense counsel did not immediately rise in front of the jury and protest, anyone experienced in the ways of a trial courtroom can appreciate the urgent necessity not to emphasize and press home the improper allegation.[5] The virus had already been implanted and could not be eradicated. *People* v. *Levan*, 295 N.Y. 26, 64 N.E. 2d 341 (1945); cf. *Vaughan* v. *Magee*, 218 Fed. 630, 631, 632 (C.A. 3 1914); *Beck* v. *Wings Field, Inc.*, 122 F. 2d 114, 117 (C.A. 3 1941). The only meaningful solution is to take steps to prevent such instances of misconduct from arising. *Greenberg* v. *United States*, 280 F. 2d 472, 474 (1st Cir. 1960).

There is today a great need for thorough and forthright examination of the permissible limits of argument to the jury. It exists in virtually every American jurisdiction. See the excellent studies in Levin and Levy, *Persuading the Jury with Facts Not in the Evidence*, 105 U. Pa. L. Rev. 139 (1956); Note, *Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 Col. L. Rev. 946 (1954); Anno. 78 A.L.R. 1438 (1932). The issue is both important and timely for consideration by this Court.

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[5] The inefficacy of attempting to undo the damage is perfectly illustrated by the reaction of the trial judge to this objection. He expressed serious doubt whether cheating the Government was not treason. (745a). It is manifest that a popular concept of treason would include tax evasion. A defendant would not be helped at all by a judge cautioning them that, technically, such conduct is not treason.

2. The trial court's partial and argumentative statement to the jury concerning the credibility of Joseph Abrams

This Court has previously spoken on the subject of the propriety of a trial judge commenting upon the credibility of a witness. In 1933, the Court decided *Quercia* v. *United States*, 289 U.S. 466, where the trial court informed the jury that he believed every single word that the defendant had said, except where he agreed with the Government's testimony, had been a lie. The Court held that this constituted unfair comment on the testimony and warranted a new trial for the defendant.

Of the many elements that go into the constitutional right to trial by jury, none is so intangible as that of credibility of witnesses. The special responsibility of the jury on matters of credibility was recently brought out by the Court of Appeals for the First Circuit in the noteworthy case of *Greenberg* v. *United States*, *supra*. It is the kind of question in which demeanor plays so important a part, whether rightly or wrongly. And it is therefore, necessarily, a special province for the jury.

It follows that any judicial commentary on the subject of credibility is suspect as an improper intrusion into affairs which should be left entirely to the jury. The trial judge in *Quercia* was especially crude in his commentary, but the main prejudice to the defendant arose from his conclusion of the defendant's lack of veracity rather than his unique and unpersuasive reason for disbelief.

In this case, the trial court threw the weight of his office and the prestige of his position into the dispute over the credibility of Joseph Abrams. By declaring

that he believed Abrams and did not believe petitioner, the court did as much harm to petitioner as the judge did to Quercia when he said that he thought the defendant had lied. On a crucial issue in the case, the judge's comment on so intangible a matter raises a serious question, which is clearly worthy of review by this Court.

Aggravating the court's intrusion into the special province of the jury is the character and background of the person whom the court stated to be worthy of belief. Abrams was not an upright citizen of proven good character and unimpeachable reputation. He was rather a proven thief and liar, an unprincipled but sly felon, who seized and capitalized upon an opportunity to extricate himself as far as possible from a whole net of criminal prosecutions.

The injury to petitioner was further compounded by the grossly unfair way in which the matter of Abrams' credibility was put to the jury. There was no calm and *impartial* analysis of the host of factors in Abrams' character and background to make anything he said suspect. Only one was mentioned, the demonstrated lie on the witness stand. And the trial court said: "Is this sufficient to disregard his testimony altogether?" This charge amounts to a direction to disregard all other reasons.

It is submitted that the charge on this score was really an insidious device to persuade the jury and to show the jurors that the judge was on the side of the government. *United States* v. *Carmel*, 267 F. 2d 345, 350 (7th Cir. 1959); *Blumberg* v. *United States*, 222 F. 2d 496, 501 (5th Cir. 1955). Traditionally, such a charge should be condemned.

The action of the trial judge raises three different questions of obvious and pervading importance: *First*, when if ever is it appropriate for a trial judge to intrude into the province of the jury by expressing an opinion on the credibility of witnesses? *Second*, is it proper for a judge ever to place the imprimatur of his office on the testimony of a person of the class of Joseph Abrams? *Third*, when a trial judge does guide the jury on an issue of credibility, can he do so in such an unfair and prejudicial way as was done in this case? It is respectfully submitted that these questions are fundamental to the administration of criminal justice in the federal courts.

3. The District Court's reading of an extract from the record so as to distort the value of that evidence

The action of the trial judge in reading directly from the record a portion of the testimony of a prosecution witness, without at the same time recalling and giving mention, let alone equal emphasis, to the defense undercutting of that testimony, presents an important question on the power of the trial judge to comment on the evidence. The effect of the court's action in this case was to lend added credence to Mrs. Barko's damaging statements by repeating them at the end of a lengthy trial without also recalling to the jury that this testimony was radically different from the statement the witness had made under oath five years before when her recollection was fresh. (715a).

The exercise by a federal trial judge of his prerogative to comment on the evidence is highly dangerous unless the trial judge is scrupulously fair and impartial in the presentation of his views. One of the most sensitive aspects of the procedure is illustrated here when

the judge does not speak from his own recollection, which a jury might disregard, but reads *directly from the transcript* of the original testimony. (708a). Matters thus selected by the judge are engraved on the juror's minds just as they are about to begin their deliberations. The possibilities of injustice demand that where excerpts are read, the total context must likewise be presented. The Court of Appeals, standard that would allow a judge to quote any testimony that had not been recanted but only contradicted on the witness stand is so extravagantly unfair as to demonstrate the urgent necessity for review of the problem in this Court.

4. The refusal of the trial judge to consider evidence offered to show that the Government had mounted inconsistent prosecutions

Nothing should be more clear than that the United States cannot properly convict two defendants of a crime which only one of them could conceivably have committed. In this case certain corporate funds were diverted into the personal accounts of Abrams or petitioner. Petitioner contended that all the funds had gone to Abrams so that he, petitioner, had received no personal income.

The Government charged both petitioner and Abrams with receiving this personal income. Petitioner attempted to show by the Grand Jury minutes, first by subpoena (460a-465a), see *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1960), and then by proceedings in New York to obtain them, that Government witnesses had testified that Abrams received all the money. This effort was stymied when the trial judge refused to continue the trial for one or two days (602a, 649a-650a, 668a-670a), or even to read the minutes upon

receiving them. (742a). See *United States* v. *Hernandez*, F. 2d (C.A. 2, Docket No. 25604, Aug. 24, 1960). It would not have been too late if the District Judge had made the minutes a part of the record and read them in connection with petitioner's post-trial motions.

The issue here is the standard of conduct to be followed by representatives of the United States. In the court below, the Government took the position that, as long as convictions are obtained it could make no difference that the prosecutions rested upon inconsistent testimony of Government agents. Such a cavalier and insensible attitude destroys a principle which ought to be basic to the search for justice in the federal criminal courts.

There is presented in this case a substantial conflict between the Courts of Appeals which this Court should resolve.

5. The unprecedentedly harsh sentence in this case, openly based upon petitioner's refusal to be convicted on a plea of guilty, as upheld in the Court of Appeals is directly in conflict with the decision of the Seventh Circuit in United States v. Wiley, 278 F. 2d 500 (C.A. 7 1960).

No problem in criminal law is more vitally important today than the anarchical inequality in sentences.

> "The achievement of the purposes of the criminal law can never be satisfactorily approximated until this intractable problem is in some fashion reduced to minor, instead of major, proportions. The very ideal of justice is offended by seriously unequal penalties for substantially similar crimes, and the most immediate of its practical purposes are obstructed. Grievous inequalities in sentences are ruinous to prison discipline. And they destroy

> the prisoner's sense of having been justly dealt with, which is the first prerequisite of his personal reformation. Experience seems to show that large numbers of sentencing judges with power to fix both individualized minimum terms and individualized maximum terms will inevitably produce an indefensible heterogenity of result. How can a reasonable degree of order be brought into this chaos?" Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401, 439 (1958).

The Seventh Circuit, in *United States* v. *Wiley*, 278 F. 2d 500 (C.A. 7 1960), provided a partial answer to the important question put by Professor Hart. There the trial court had imposed a severe sentence upon the expressed ground that the defendant had insisted upon his constitutional right to stand trial. His confederates, including the "ring leader" with several prior convictions, pleaded guilty and received lighter sentences. The manifest disparity in the sentences underscored the unacceptable rationale of the trial judge to penalize those who seek a trial rather than plead guilty.

In this case, the trial judge did the same thing. He repeatedly castigated petitioner for not allowing sentence to be imposed on a guilty plea. This was the overriding consideration in the mind of the judge, to the extent that his thinking is reflected in his words. The unparalleled severity of the resultant sentence is revealed, not in comparison with sentences imposed on confederates (although the charges against Abrams were dismissed), but in comparison with what this judge and his fellow judges have done in similar cases.

The two cases were thus substantially identical at the trial stage. The conflict arises because the Third Circuit affirmed the sentence of petitioner while the

Seventh Circuit in the *Wiley* case vacated the sentence as too harsh and based on improper standards.

This conflict in the circuits reveals at least a partial solution to the anarchical pattern of sentencing in the federal courts. The Seventh Circuit rule opens the way to a limited appellate review of sentence where there is great disparity of punishment and the lower court patently invoked improper standards in fixing the more harsh penalty. There is again presented in these cases a conflict between the Courts of Appeals on a matter which goes to the very core of the criminal law, a matter on which there is today the opportunity for this Court to make substantial strides forward in the quality of justice in the federal courts.

6. The prosecutor's suppression of evidence in this case is directly in conflict with the decisions of this Court

On April 20, 1960, the indictments against Abrams were dismissed (Additional Appendix, pp. 772a-775a). But it also appears from the order of dismissal that permission to dismiss was received by the prosecutor from the Department of Justice by letter dated *November 20, 1959.*[6]

It is respectfully submitted that the pre-trial motions for consolidation and for severance, the statement of the prosecutor to the jury in his opening speech, and his silence when the subject of nol-pros was brought up on cross-examination, particularly in the light of the remarks of the trial judge at that time and in the charge, misled both the jury and the defendant, and

[6] It should also be noted that the orders of dismissal (Additional Appendix, pp. 775a-776a) are incorrect in the statement that Abrams was then serving a sentence for evasion of his personal and corporate income taxes. He was serving a sentence for embezzlement. (310a-311a).

amount to suppression of material evidence in the case by the prosecutor which would have a direct bearing upon the motive, and therefore the credibility, of Abrams with respect to his testimony in the case.

We again allude to the obligations of the prosecuting attorney as summarized in *Berger* v. *United States*, 295 U.S. 78 (1955), and refer to the most recent case of *Alcorta* v. *Texas*, 355 U.S. 28 (1957), basing its decision on Constitutional due process.

We submit that the prosecuting attorney was duty bound not to mislead the jury into thinking that Abrams would, or even might go to trial, and that he was duty bound to disclose the true facts of the situation so that they could be handled properly and without prejudice. Once the subject was brought out on cross-examination, he was also duty bound to state the facts. Certainly he was duty bound not to permit the appearance which was the result in the circumstances, that Abrams had nothing to gain from his testimony in this case.

CONCLUSION

The handling of this case below represents so substantial a departure from the accepted and usual course as to call for the exercise of this Court's power of supervision. This petition for a writ of certiorari should be granted.

Respectfully submitted,

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